

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,

Plaintiffs

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

No. CV-74-00090-TUC-DCB

Maria Mendoza, et al.,

Plaintiffs,

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.

Defendants.

No. CV-74-0204-TUC-DCB

**ORDER**

1           Culturally Responsive Pedagogy and Instruction (CRPI)

2           The Court revisits TUSD's appointment of the Director of Culturally Responsive  
3 Pedagogy and Instruction (CRPI), a position critical to TUSD's successful  
4 implementation of courses of instruction in cultural and historical experiences and  
5 perspectives of African-American and Latino communities. These Culturally Responsive  
6 Courses (CRCs) are a key methodology for engaging African-American and Hispanic  
7 students. TUSD has twice advertised to hire for the CRPI Director's position and both  
8 times the solicitation processes were flawed and both times TUSD ended up hiring in-  
9 house to fill the position, and both times TUSD filled the position with a candidate  
10 experienced with Hispanic culture and pedagogy, not African-American studies.

11           The USP was adopted February 20, 2013. TUSD advertised the CRPI Director  
12 position, nationally, on September 24, 2013. This solicitation resulted in recruiting 49  
13 sub-finalists and choosing eight finalists, before aborting the effort because the interview  
14 and selection process was leaked to the public. TUSD, thereafter, recruited and  
15 appointed a TUSD retiree, Dr. Salvador A. Gabaldon, as the CRPI Director. He had  
16 experience developing and teaching curriculum focused on Latino social, cultural, and  
17 historical experiences and advocating for and supporting instruction for English  
18 Language Learner (ELL) students. After objections from both Plaintiffs and based on the  
19 R&R from the Special Master, this Court approved appointing Dr. Gabaldon as Acting  
20 Director. Pursuant to the agreement of the parties, the Court ordered TUSD to undertake  
21 the hiring of the CRPI Director in full compliance with USP § IV.D.1 and 3 and §  
22 V.4.E.4.c,<sup>1</sup> to be completed by the end of the 2014. (Order (Doc. 1650) at 5. To alleviate  
23 the concerns of the Fisher Plaintiffs that the Acting Director of CRPI had no experience  
24 to determine CRPI for African-American students, *id.* at 3-4, the Court ordered TUSD to  
25 utilize the services of Dr. Jacqueline Jordan Irvine, an African-American CRPI expert,  
26 including using her expertise for the hiring and selection process of the Director of CRPI,  
27 *id.* at 5.

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28           <sup>1</sup> See USP (Doc. 1713), edited for typographical errors.

1 The Court ordered TUSD to file a Notice of Hiring the CRPI Director. The Court  
2 ordered further briefing on whether the USP § IV.D hiring procedures applied when  
3 TUSD designated a current employee to fill a position versus hiring a new employee.

4 TUSD Notice of Hiring CRPI Director

5 On December 17, 2014, TUSD filed a Notice of Hiring the CRPI Director,  
6 Lorenzo Lopez, Jr. (Notice (Doc. 1733)).

7 Again, even with expert advice by Dr. Irvine, the hiring process was flawed. “Too  
8 little time was given for responses (30 days); the position statement did not advise  
9 candidates of the unique and important role to be played and failed to anticipate concerns  
10 regarding potential CRC attacks from the State; it was not sent to sources with great  
11 potential to yield candidates,” (R&R (Doc. 1775) at 4), and failed to include a statement  
12 that TUSD is an equal opportunity employer, which is a phrase used to welcome diverse  
13 applications, *id.* Only three African-Americans applied.

14 Again, TUSD hired in-house and chose a candidate that has no experience  
15 working with African-American students. Mr. Lopez’ experience was as the CRPI  
16 Program Coordinator and his expertise is in teaching Mexican American Studies (MAS)  
17 courses. Again, the Fisher Plaintiffs complain about, and again TUSD proposes to  
18 alleviate, Mr Lopez’ lack of African-American expertise by engaging a panel of experts  
19 to review the CRC courses and the elements of professional development relevant to  
20 CRPI and to engage an African-American expert on CRPI to advise Mr. Lopez on aspects  
21 of CRPI that are especially important to the success of African-American students.  
22 (R&R (Doc. 1775) at 6.)

23 The Fisher Plaintiffs remain concerned. The Court does not address the Fisher  
24 Plaintiffs’ accusations that TUSD has lied about which job description was disseminated  
25 to applicants and lied about one of the three African-American applicants not being  
26 available for the position because he accepted a different position in TUSD. The Court  
27 does observe that the level of distrust between the parties has fallen so low as to even  
28 erode professional confidence that normally exists between attorneys in respect to

1 representations made to each other and the Court. The Special Master has investigated  
2 both allegations and is confident that he has identified the job description circulated by  
3 TUSD and that one of the African-American candidates took a different position and so  
4 there were only two African-American candidates for the CRPI Director's position.

5 The Court turns to Fisher Mendoza's substantive concerns, which are no less  
6 important now than they were when the Court first addressed them in its Order issued  
7 August 21, 2014. The stop-gap measures of appointing African-American experts to  
8 advise administrators overseeing CRPI, which allowed time for TUSD to conduct a  
9 robust nationwide search for a highly-qualified CRPI Director, cannot become the  
10 permanent standard by which TUSD provides CRPI African-American expertise. The  
11 Fisher Plaintiffs are legitimately concerned that African-American students' interests in  
12 CRPI will be over-born by TUSD's need to serve the interests of the much larger  
13 Hispanic student body.

14 The Fisher Plaintiffs complain that Mr. Lopez does not have the State  
15 certifications he needs to serve in the supervisory role of the Director of CRPI. Under  
16 Arizona law, Administrative Certification, is required for administrators who have  
17 responsibility for teachers and students. (Fisher Objection (Doc. 1779) at 3-6.) It  
18 appears Mr. Lopez was not so certified at the time he was hired as the CRPI Director but  
19 that he is obtaining this certification. The Special Master is not concerned by this lack of  
20 certification because he asserts that the Director of CRPI does not have the type of  
21 supervisory responsibility requiring such certification. The Court finds the important  
22 question is not whether the CRPI Director is certified, but is whether the CRPI Director  
23 has supervisory authority over teachers and students. The Fisher Plaintiffs' concerns  
24 about equal program administration can only be met where the administrator in charge  
25 has sufficient administrative authority to protect both student bodies' interests in CRPI.  
26 If as the Special Master suggests this authority is not lodged in the CRPI Director then  
27 perhaps the Fisher Plaintiffs' recommendations should be aimed higher.

1           Alternatively to having one CRPI Director that can serve the interests of both  
2 student bodies, the Fisher Plaintiffs recommend amending the USP to provide for co-  
3 CRPI Directors, one for African-American students and one for Hispanic students. This  
4 would address the Special Master's observation that: "Few candidates would have  
5 experience in developing and teaching culturally relevant courses or have CRP expertise  
6 for both Latino and African-American students . . . ." (R&R (Doc. 1775) at 5.) The USP  
7 clearly and expressly allows for the CRPI Director to have "experience developing and  
8 teaching curriculum focused on the African-American and/or Latino social, cultural and  
9 historical experience at secondary level." USP § V.E.4.c. (emphasis added). The Fisher  
10 Plaintiffs call for the USP to be amended and ask the Court to set aside the appointment  
11 of Mr. Lopez and order another search.

12           The Court is not inclined to repeat directives which have failed. But, the Fisher  
13 Plaintiffs are not without recourse. The Court agrees with the Fisher Plaintiffs that  
14 temporary experts who are knowledgeable in African-American CRC pedagogy are not a  
15 permanent solution to a lack of African-American administrators knowledgeable in  
16 African-American CRPI. The Court finds that the Plaintiffs' interest in even-handed  
17 CRPI serving both Plaintiffs is better ensured if this responsibility is placed in a TUSD  
18 administrator with requisite supervisory power to guarantee equal access to CRPI for all  
19 minority students. The Special Master's R&R suggest the CRPI Director is not that  
20 administrator. The Court directs the Special Master to ensure that the administrative  
21 position having the requisite supervisory authority over the implementation of CRPI  
22 requires the employee filling that position to have comprehensive expertise with respect  
23 to cultural pedagogy as applied to all students, including Black and Hispanic, and ELL  
24 students. The Special Master shall identify this administrative position and review the  
25 job description for that position to ensure such expertise is required there to protect the  
26 interests of both Plaintiffs' classes. The Special Master shall report to the Court whether  
27 the person currently holding that position has such expertise. If not, the Special Master  
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1 shall recommend how to remedy a lack of administrative expertise in the area of African-  
2 American CRPI.

3 TUSD Employee Designations

4 The Court called for supplemental briefing on the question of whether TUSD may  
5 circumvent USP hiring requirements, § IV.D.1 and 3, if it designates a current TUSD  
6 employee to fill a position instead of hiring a new employee to fill the position. The  
7 Fisher Plaintiffs call for amendment of the USP to eliminate this option. They complain  
8 that TUSD's in-house hiring practices are perpetuating the status quo and the USP calls  
9 for robust recruitment of diverse certified and administrative staff. *See* USP § IV  
10 (requiring enhancement of racial and ethnic diversity of administrators and certificated  
11 staff; requiring review of outreach, hiring, retention, etc. policies to ensure they result in  
12 such diversity). The Mendoza Plaintiffs point out, however, that Dr. Gabaldon was the  
13 sole objection made by the Plaintiffs in respect to all the designations made by TUSD.  
14 The objections to Dr. Gabaldon were in part because he was not a current employee of  
15 TUSD and it appeared that TUSD intentionally recruited him in lieu of complying with  
16 the USP hiring procedures. While the Mendoza Plaintiffs' supplemental brief reflects  
17 there is no problem with the USP designation provisions, the circumstances of the  
18 Gabaldon appointment support the Fisher Plaintiffs' position that TUSD may not be  
19 complying with provisions of the USP which require them to take robust measures to  
20 improve the diversity of certified and administrative staff. The problem, if there is one,  
21 may be bigger than the USP designation provision or may not be related to it at all.  
22 Because improving diversity in certified and administrative staff is a key component of  
23 the USP, the Court will ask the Special Master to undertake a review of the USP staffing  
24 efforts undertaken by TUSD and provide an R&R to the Court whether they are resulting  
25 in improved diversity in TUSD's certified and administrative staff.

26 **Accordingly,**

27 **IT IS ORDERED** that the Court adopts the R&R (Doc. 1775) filed by the Special  
28 Master as follows: 1) the Court confirms the appointment of Mr. Lopez as the CRPI

1 Director; 2) TUSD, pursuant to its agreement, shall engage a panel of African-American  
2 experts to review the CRC courses and the elements of professional development  
3 particularly relevant to CRPI, and 3) TUSD, pursuant to its agreement, shall engage an  
4 African-American expert on CRPI to advise Mr. Lopez on the aspects of CRPI that are  
5 especially important to the success of African-American students.

6 **IT IS FURTHER ORDRED** that within 30 days of the filing date of this Order,  
7 the Special Master shall file an R&R with the Court to: 1) identify the administrative  
8 position having supervisory responsibility for implementation of CRPI with the authority  
9 to ensure the even-handed administration of CRPI for all students; 2) advise whether the  
10 job description for that position requires the employee filling that position to have  
11 expertise with respect to culturally responsive pedagogy for all students, including Black  
12 and Hispanic, and ELL students; 3) advise whether the person currently holding that  
13 administrative position has the requisite expertise, and 4) make any necessary  
14 recommendations.

15 **IT IS FURTHER ORDERED** that within 45 days of the filing date of this Order,  
16 the Special Master shall file an R&R with the Court that reports on the progress being  
17 made by TUSD to increase diversity in its administrative and certificated staff and  
18 recommend any specific measures or undertakings which are required under the USP,  
19 any action plan, or which can practicably be made to improve the staffing disparities that  
20 exist in TUSD.

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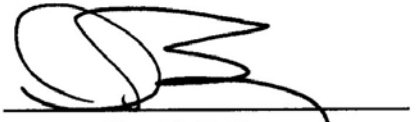
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1           **IT IS FURTHER ORDERED** that the Special Master shall undertake the  
2 preparation and filing of these R&Rs, pursuant to the oversight, monitoring, and  
3 reporting responsibilities assigned to the Special Master in the USP § X.E and the  
4 January 6, 2012, Order.

5           Dated this 26th day of January, 2016.

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David C. Bury  
United States District Judge